

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LANCE IAN OSBAND,

Petitioner,

vs.

No. CIV S-97-0152 WBS KJM

DEATH PENALTY CASE

ROBERT L. AYERS, JR.,  
Acting Warden of San Quentin  
State Prison,

Respondent.

ORDER

Both parties make motions in limine regarding the other party's witness and exhibits list. The undersigned finds oral argument on most aspects of these motions unnecessary. After reviewing the briefs of both parties, and good cause appearing, the court finds and orders as follows.

RESPONDENT'S MOTION IN LIMINE

I. Rule 7 Expansion of the Record

Petitioner seeks to expand the record with eleven documents or categories of documents. Respondent objects to several documents. Under Rule 7 of the Rules Governing Section 2254 Cases, the court may expand the record with materials relating to the petition to avoid some of the time and expense of an evidentiary hearing or to supplement a hearing. Adv. Comm. Notes to Rule 7, Rules Governing Section 2254 Cases. "The materials that may be

1 required include letters predating the filing of the petition, documents, exhibits, and answers  
2 under oath to written interrogatories propounded by the judge. Affidavits may also be submitted  
3 and considered as part of the record.” Rule 7, Rules Governing Section 2254 Cases.

4 A. Requests 1, 2, 4 and 5

5 Petitioner requests admission of the “secret witness” letter,<sup>1</sup> a January 9, 1987  
6 letter from Burton Loehr to Vincent O’Brien, transcripts of interviews trial investigator Robert  
7 Wilcox conducted of Eric Gibson, and transcripts of interviews Wilcox conducted of Joe  
8 Blackwell. Respondent seeks a limitation on the admission of these documents into the record.  
9 He asks that they be considered only to show trial counsel was aware of, or should have been  
10 aware of, certain information. Primarily, respondent seeks to reserve any hearsay objection to  
11 these documents until it is clear how petitioner intends to use them. The undersigned agrees that  
12 the documents may be admitted to the record but will not limit consideration of them at this time.  
13 Respondent is free to object to petitioner’s use of the documents at the time they are used.

14 B. Dr. Mehtani’s Deposition

15 The parties appear to have resolved any differences about corrections to the  
16 transcript of Dr. Mehtani’s October 5, 2006 deposition. By separate order, the undersigned has  
17 granted petitioner’s request to expand the record to include Dr. Mehtani’s corrected deposition.

18 C. Admission of Witness Declarations

19 Petitioner seeks admission of the declarations of six of petitioner’s friends in  
20 support of claim 1, that trial counsel was ineffective for failing to investigate and present  
21 evidence of petitioner’s innocence. The court granted an evidentiary hearing on claim 1 in part to  
22 “test the reliability of [petitioner’s] friends’ statements” that other individuals were responsible  
23 for the murder. May 11, 2005 Order at 18. The undersigned agrees that all testimony of Michael  
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26 <sup>1</sup> This letter is exhibit A to petitioner’s motion for an evidentiary hearing.

1 Clark, Jaimie Breaux, Shawn Flynn, Aubrey Richey, Leonard James and Eric Gibson should be  
2 taken in court. Accordingly, admission of their declarations under Rule 7 is not necessary.

3 II. Objections to Petitioner's Witnesses

4 A. Direct Testimony by Declaration

5 As stated in the previous section, all testimony of Michael Clark, Jaimie Breaux,  
6 Shawn Flynn, Aubrey Richey, Leonard James and Eric Gibson will be taken during the  
7 evidentiary hearing. Respondent also asks the court to instruct counsel for petitioner about the  
8 propriety of their questions. The court will not do so. Respondent is free to object to any  
9 questions during the evidentiary hearing.

10 With respect to the testimony of Leonard James, respondent argues it is not  
11 relevant to the issues raised by claim 1. Petitioner asserts Mr. James would testify regarding his  
12 knowledge of petitioner's relationship with Richard Williams and his knowledge of when  
13 Williams left Sacramento. He also claims James' testimony is "relevant to the credibility of  
14 witnesses who describe Mr. Williams's and W.J. Thomas's inculpatory statements." Mr. James  
15 was also a friend of petitioner's. The claim 1 issues for the evidentiary hearing involve the  
16 reasonableness of counsel's conduct in investigating other suspects and whether prejudice  
17 resulted from counsel's conduct. Mr. James' testimony may be relevant to that inquiry and the  
18 undersigned will not bar him from testifying. The court will consider any objections to Mr.  
19 James' testimony at the time it is given.

20 B. Failure to Summarize Witnesses' Testimony

21 Respondent next complains that petitioner may present testimony from Jaimie  
22 Breaux and Shawn Flynn that is not covered by their declarations. In his opposition, petitioner  
23 states that he mistakenly omitted one subject from the declarations of Breaux and Flynn. He  
24 states that he intends to elicit from these witnesses testimony that the sunglasses pictured in the  
25 exhibits listed in petitioner's November 22, 2006 Addendum to Exhibit List are consistent with  
26 those the witnesses remember seeing on Richard Williams. On the basis of petitioner's

1 representation that the declarations, with this one additional subject, summarize the testimony of  
2 Breaux and Flynn, respondent withdrew his objection.

3 C. Limitation of Burton Loehr's Testimony

4 Respondent seeks clarification that Mr. Loehr will not testify regarding  
5 petitioner's competency to stand trial. Petitioner agrees that Loehr's testimony must relate to the  
6 issues of the reasonableness of counsel's conduct raised in claims 1, 9 and 20. However,  
7 petitioner notes that Loehr's ability to communicate with petitioner may be relevant to these  
8 claims. Respondent counters that the issues in claims 1, 9, and 20 relate to the performance of  
9 the lawyers who succeeded Mr. Loehr. That is not the case. While Mr. Loehr was replaced prior  
10 to the start of trial, he was undoubtedly involved in the preparation of the guilt phase case  
11 relevant to claims 1 and 9 and may have been involved in preparation of the penalty phase case,  
12 relevant to claim 20. At this point, the undersigned is not willing to limit Mr. Loehr's testimony  
13 as respondent wishes.

14 III. Objections to Witnesses Petitioner May Call

15 A. Testimony Outside Scope of this Evidentiary Hearing

16 Respondent argues that petitioner has not sufficiently summarized the testimony  
17 of Phillip White and Wendy Saxon. In his witness list, petitioner simply states that Dr. White "is  
18 expected to testify regarding the nature of his work on this case, the illness and death of Loren  
19 W. Look" and Dr. Saxon "will authenticate documents in her file and testify regarding her work  
20 in this case at trial." In his opposition petitioner states that respondent is aware of the  
21 White/Look report and that Dr. Saxon's work on the case was "not extensive and included help,  
22 or offers of help with jury selection, and strategy." Petitioner also states respondent would be  
23 aware of White and Saxon's work if respondent had not declined production of some documents  
24 offered to him in discovery.

25 The undersigned is aware of no requirement that a party should be ruled out of  
26 luck at the pre-trial stage if it had the opportunity to, but did not, obtain through discovery

1 documents the other side later intends to use at trial or documents that would have informed a  
2 party of the possible testimony of witnesses its opponent later decides to offer. If either party  
3 lacks documents the other intends to offer as evidence, copies of those documents shall be  
4 provided to the opponent immediately.

5 For now, however, the parties' briefs do not clarify either the subject of Drs.  
6 White and Saxon's testimony or just why it is relevant or not to the subjects at issue in this  
7 evidentiary hearing. The parties will be required to file further clarification. The undersigned  
8 will hear argument on the issue at the January 16, 2007 conference.

9 B. Objections Relating to Potential Testimony of Williams and Thomas

10 1. Failure to Summarize Testimony of Williams, Thomas and Wright

11 Respondent first argues that petitioner has insufficiently summarized the  
12 testimony of Richard Williams, W.J. Thomas and Leon Wright.<sup>2</sup> Respondent feels petitioner's  
13 characterization of these persons' testimony as regarding their "whereabouts on or about the  
14 night of October 5, 1985" and regarding their "prior statements" is too vague. Respondent states  
15 he is unaware of any prior statements made by Williams, and no inculpatory statements made  
16 directly by Williams or Thomas. In addition, respondent objects to petitioner's characterization  
17 in his opposition of Wright's testimony as potentially involving prior statements made to him by  
18 Thomas and Williams. Respondent states he is unaware of any statements made by Thomas and  
19 Williams to Wright. The court agrees that petitioner's characterization of the testimony of these  
20 three witnesses is insufficient to allow respondent to prepare. The court will order clarification.

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24 <sup>2</sup> Respondent also lists Henry Hawkins here. However, in his opposition, petitioner  
25 states Mr. Hawkins would only testify for impeachment purposes so there is no need for a  
26 summary of his testimony. While the court's June 14, 2006 scheduling order did not exclude  
impeachment witnesses from the requirement that the parties summarize testimony, the  
undersigned finds a summary of the possible testimony of witnesses used solely for impeachment  
to be unnecessary. Cf. Fed. R. Civ. P. 26(a)(3).

1                   2. Objection to Deposition Testimony of Williams

2                   Respondent next objects to any attempt to depose Richard Williams. Respondent  
3 asked first for assurances that Williams will not simply refuse to testify before counsel travel to  
4 Tennessee to take Williams' testimony. Because Williams' testimony is currently only  
5 "potential" the court need not determine whether the time and expense of deposing Mr. Williams  
6 is justified. After the evidentiary hearing the court will set a schedule for taking any remaining  
7 testimony. Issues involving the logistics or propriety of taking that testimony may be addressed  
8 at that time.

9                   3. Failure to Summarize Testimony of Mitchell and Winn

10                  Petitioner states Ms. Mitchell would testify that she was married to Richard  
11 Williams, "is familiar with his character as a dishonest person," and "observed Petitioner follow  
12 Williams's lead." Ms. Winn would testify "regarding her prior relationship with William J.  
13 Thomas, and his character for truthfulness." Respondent objects that these summaries are  
14 insufficient because they do not establish whether the testimony will be based on "rational  
15 perceptions of the witnesses or are just mere conclusory observations" and whether the testimony  
16 is excludable under Federal Rule of Evidence 403. The summaries of testimony need not  
17 establish all grounds for objection. Respondent is free to object to the testimony of Mitchell and  
18 Winn if and when the need arises.

19 IV. Objections to Petitioner's Exhibits

20                  Respondent primarily objects to the lack of sufficient descriptions of a number of  
21 the exhibits petitioner intends to offer. Petitioner contends the descriptions would be sufficient if  
22 respondent had taken advantage of all the discovery granted him. Both parties are entitled to be  
23 advised of the other side's exhibits and witnesses prior to the hearing. The undersigned will

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1 order the exchange of all exhibits prior to the evidentiary hearing,<sup>3</sup> and will hear objections to  
2 specific exhibits the morning of the first day of the hearing.

3 V. Other Objections

4 The undersigned agrees that it is premature to rule on objections to exhibits before  
5 petitioner has introduced them. They will be considered at trial. The court will also consider at  
6 trial respondent's relevancy objections to items III.A.11, III.A.46, and III.B.6.

7 With respect to demonstrative exhibits, respondent asks that they be provided  
8 prior to the evidentiary hearing. Those exhibits shall be provided to respondent along with the  
9 exchange of all exhibits prior to the hearing.

10 VI. Respondent's Other Motions

11 A. Supplemental Exhibit List

12 Petitioner does not object to respondent supplementing his exhibit list with the  
13 items listed on pages 20-21 of respondent's December 1, 2006 Objections.

14 B. Stipulation re Loren Look

15 Respondent proposes a stipulation that Dr. White "was not going to be a testifying  
16 witness, and Mr. Look's illness rendered him unavailable as a witness before his death, which  
17 occurred at the time of jury selection." Petitioner's counsel shall contact respondent's counsel to  
18 determine if a stipulation can be reached. The parties shall inform the court of the status of any  
19 stipulated facts or testimony during the status conference on January 16, 2007.

20 C. Exclusion of Witnesses

21 Both parties seek exclusion of witnesses who are expected to, or may, testify at  
22 the evidentiary hearing. In addition, the court will prohibit any agent or representative of a party  
23 from revealing the testimony of a witness to any other witness. The court agrees that both

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26 <sup>3</sup> In his reply brief, respondent states petitioner has agreed to provide his exhibit binder to  
respondent by January 5, 2007.

1 parties' investigators, Leon Wright and James Becker, will be permitted to be present during  
2 court proceedings to assist counsel.

3 D. Impeachment with Prior Convictions

4 1. Witnesses Petitioner Expects to Present

5 a. Shawn Flynn

6 Respondent seeks to impeach Flynn with a 1987 felony conviction for  
7 transporting/selling a controlled substance and a 1998 conviction for petty theft. Federal Rule of  
8 Evidence 609 permits admission of evidence that a witness committed a crime as impeachment.  
9 However, Rule 609 imposes a time limitation on that evidence:

10 Evidence of a conviction under this rule is not admissible if a  
11 period of more than ten years has elapsed since the date of the  
12 conviction or of the release of the witness from the confinement  
13 imposed for that conviction, whichever is the later date, unless the  
14 court determines, in the interests of justice, that the probative value  
15 of the conviction supported by specific facts and circumstances  
16 substantially outweighs its prejudicial effect.

17 As petitioner points out, Flynn's petty theft conviction is not appropriate for impeachment under  
18 Rule 609. With respect to Flynn's 1987 felony conviction, respondent argues that it is only a  
19 little more than ten years prior to the date Mr. Flynn signed his 1998 declaration and that his  
20 credibility at that time and at the time of trial is relevant. For purposes of impeachment, the  
21 conviction could only be relevant to Mr. Flynn's credibility at the time his testimony will be  
22 heard at the evidentiary hearing in this court. However, while the evidence may not be  
23 admissible to impeach Mr. Flynn's current credibility because it is too old, it may be relevant to  
24 consideration of the question of trial counsel's conduct. As petitioner states, "the gravamen of  
25 Mr. Osband's claim is that trial counsel should have given the jury an opportunity to hear these  
26 [friend] witnesses' compelling testimony at trial." Pet'r's Dec. 15, 2006 Resp. to State's Mot. in  
Limine at 6. The potential impeachment of that testimony would or should have been a relevant  
consideration for trial counsel. Of course, the relevant law for admissibility of that evidence at  
trial is California law, not Rule 609.



1                   b. Jaimie Breaux and Eric Gibson

2                   Petitioner does not object to respondent's use of Breaux's 2001 felony conviction for  
3 fourth degree arson and Gibson's 1997 felony conviction for corporal injury on a spouse/cohabitant  
4 for impeachment.

5                   c. Aubrey Richey

6                   Petitioner agrees to the use of Richey's 2004 conviction for falsely representing his  
7 identity to a peace officer for impeachment purposes. Because they are over ten years old, the other  
8 convictions are not relevant to impeach Richey's testimony at the evidentiary hearing before this  
9 court under Rule 609. However, as described above with respect to Mr. Flynn's older convictions,  
10 Richey's convictions that pre-date the trial may be admissible to show the reasonableness of  
11 counsel's conduct regarding the failure to put Mr. Richey's testimony before the jury.

12                   d. Leonard James

13                   Mr. James' 1998 felony conviction for possession of a controlled substance is  
14 admissible for impeachment purposes under Rule 609. However, his 1991 conviction is too old for  
15 that purpose and not old enough to be relevant to the question of ineffective assistance at trial.

16                   2. Witnesses Petitioner May Call

17                   Petitioner does not object to respondent's request to impeach Williams and Thomas  
18 with their 1986, 1987, 1988 and 2001 convictions.

19                   E. Crime Victims' Rights Motion

20                   Respondent seeks permission for the victims' family members to attend the  
21 evidentiary hearing. As petitioner points out, they are free to do so. With respect to Celeste Snively,  
22 who is listed as a potential witness, she is barred from only those proceedings addressing third-party  
23 culpability.

24                   F. Tape Recorder and Laptop Computer

25                   The court permits the parties to bring tape recorders and laptop computers into the  
26 courtroom for use during the evidentiary hearing.

1           G. Prior Statements of Witnesses

2                       Procedure at the evidentiary hearing will follow Federal Rule of Evidence 613(a) as  
3 requested by respondent:

4                       **a) Examining witness concerning prior statement.** In examining a  
5 witness concerning a prior statement made by the witness, whether  
6 written or not, the statement need not be shown nor its contents  
disclosed to the witness at that time, but on request the same shall be  
shown or disclosed to opposing counsel.

7                                       PETITIONER'S MOTION IN LIMINE

8 I. Rule 7 Expansion of the Record

9                       Respondent seeks to expand the record to include the Clerk's Transcript and  
10 Reporter's Transcript on the appeal of petitioner's case. Petitioner objects. He argues that the  
11 transcript in its entirety is not relevant to the issues in the evidentiary hearing. The undersigned finds  
12 expansion of the record to include trial transcripts to be a matter of form over substance. It is not  
13 possible to review petitioner's claims challenging his guilt and penalty phase trials without review  
14 of the state court proceedings. If the Clerk's and Reporter's transcripts on appeal are not already part  
15 of the record before this court, then they are admitted under Rule 7.

16 II. Admissibility of Photos of Crime Scenes and Victims

17                       \_\_\_\_\_Petitioner argues that these six photos are inadmissible for three reasons. First, they  
18 are not relevant to the issues on which this court granted an evidentiary hearing. See Fed. R. Evid.  
19 402. Second, their probative value is outweighed by the danger of unfair prejudice under Federal  
20 Rule of Evidence 403. Third, they are not the originals nor are they accurate reproductions of the  
21 trial exhibits, which were destroyed in bad faith. See Fed. R. Evid. 1002, 1004(1).

22                       As respondent points out, the photos are relevant to trial counsel's strategy at the  
23 penalty phase. In interviews, petitioner's trial attorney noted that part of the penalty phase strategy  
24 was wiping from jurors' minds the "grim" and "disturbing" photos of the crime scenes and victims.  
25 Resp't's Dec. 18, 2006 Opp'n to Pet'r's Mot. in Limine ("Resp't's Opp'n") at 6-7. The court also  
26 finds that because this evidentiary hearing does not involve a jury, the prejudice contemplated by

1 Rule 403 is of less concern. This court can review the photos without being confused or misled and  
2 without unfairly prejudicing petitioner. The court thus finds their probative value outweighs any  
3 prejudice. The difficult question here is the fact that these are not the original photos shown to the  
4 jury.

5 Despite respondent's argument that the photos are relevant to understanding counsel's  
6 penalty phase strategy, respondent claims the question whether the photos offered at the evidentiary  
7 hearing are "the actual photographs that were shown to the jury is irrelevant." Resp't's Opp'n at 9.  
8 According to respondent, the issue is what sort of pictures counsel had in mind when formulating  
9 a penalty phase strategy, not what pictures the jury actually saw. In addition, respondent points to  
10 the posttrial exhibit reconstruction hearing.

11 Petitioner relies upon Federal Rules of Evidence 1002 and 1004 to argue these  
12 replacement photos should not be admitted. Federal Rule of Evidence 1002 provides: "To prove the  
13 content of a writing, recording, or photograph, the original writing, recording, or photograph is  
14 required, except as otherwise provided in these rules or by Act of Congress." Under Rule 1004,  
15 "The original is not required, and other evidence of the contents of a writing, recording, or  
16 photograph is admissible if . . . . All originals are lost or have been destroyed, unless the proponent  
17 lost or destroyed them in bad faith." In addition, Rule 1003 is relevant: "A duplicate is admissible  
18 to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the  
19 original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

20 Respondent argues Rules 1002 and 1004 are inapplicable because he does not seek  
21 to prove the contents of the photographs. Rather, he will use the photos to "illustrate" trial counsel's  
22 testimony about what the jurors saw. Respondent also points out that the California Supreme Court  
23 did not find that the photos were destroyed in bad faith. Rather, the California Supreme Court stated:  
24 "The [trial] court found that misconduct by employees in the clerk's office resulted in the exhibits'  
25 loss. Although it could not conclusively decide the nature of the misconduct, its findings suggest that

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1 the exhibits were improperly safeguarded and hence were inadvertently discarded.” People v.  
2 Osband, 13 Cal. 4th 622, 661-62 (1996).

3           Petitioner points out that the exhibit reconstruction is the subject of claim 27 of the  
4 petition. He argues that the probative value of these photos is outweighed by the time and distraction  
5 entailed in litigating this issue now. The court finds the issue of admission of these photos  
6 sufficiently complex to require oral argument. The parties shall be prepared to discuss the issue at  
7 the January 16 status conference.

8           For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED  
9 as follows:

10           1. Petitioner’s requests numbered 1, 2, 4 and 5 in his November 20, 2006 Witness  
11 and Exhibit List to expand the record are granted. Petitioner’s requests numbered 6-11 are denied.  
12 Request number 3 regarding Dr. Mehtani’s deposition is addressed in a separate order.

13           2. All testimony of petitioner’s witnesses Michael Clark, Jaimie Breaux, Shawn  
14 Flynn, Aubrey Richey, Leonard James and Eric Gibson shall be taken during the evidentiary hearing.

15           3. Respondent’s request to limit the testimony of Burton Loehr is denied. However,  
16 petitioner is reminded that Loehr’s testimony must relate to the issues of the reasonableness of  
17 counsel’s conduct raised in claims 1, 9 and 20.

18           4. By 5:00 p.m. on January 10, 2007, petitioner’s counsel shall file a clarification of  
19 the potential testimony of Richard Williams, W.J. Thomas, Leon Wright, Dr. White and Dr. Saxon.  
20 If respondent has further objections, he shall file them in writing by 5:00 p.m. on January 12, 2007.  
21 The undersigned will hear any argument on these matters at the January 16 status conference.

22           5. Respondent’s objections to the taking of the testimony of Richard Williams,  
23 Yolanda Mitchell and Francine Winn are denied without prejudice to their renewal at a later time.

24           6. By 5:00 p.m. on January 10, 2007, the parties shall exchange copies of the  
25 exhibits they intend to or may introduce at the evidentiary hearing. The parties shall have pre-  
26 marked each exhibit. Petitioner’s exhibits shall be identified by letters and respondent’s shall be

1 numbered. Any objections to exhibits that can be considered prior to the evidentiary hearing will  
2 be heard on January 22, 2007 prior to the taking of testimony.

3 7. Respondent's motion to supplement his exhibit list with the items listed on pages  
4 20-21 of his December 1, 2006 Objections is granted.

5 8. At the January 16, 2007 status conference, the parties shall inform the court of any  
6 stipulations, including any stipulations regarding Loren Look and the testimony of Dr. White.

7 9. Testifying witnesses shall be excluded from the evidentiary hearing. In addition,  
8 no agent or representative of a party shall reveal the testimony of a witness to any other witness.  
9 Although they may be witnesses, the parties' investigators, Leon Wright and James Becker, may be  
10 present during all court proceedings. In addition, victim's family member Celeste Snively may  
11 attend all aspects of the hearing except those addressing third-party culpability.

12 10. Respondent may impeach witnesses with prior convictions as specified at pages  
13 8-9 of this order. In addition, as described above, some prior convictions may be admissible in  
14 considering the claims of ineffective assistance of counsel. The court will address objections to this  
15 use of these prior convictions as the need arises during the evidentiary hearing.

16 11. The parties are permitted to bring tape recorders and laptop computers into the  
17 courtroom for use during the evidentiary hearing.

18 12. The Federal Rules of Evidence govern the evidentiary hearing in this section  
19 2254 case. Fed. R. Evid. 1101(e).

20 13. Respondent's request to expand the record to include the Clerk's Transcript and  
21 Reporter's Transcript on the appeal of petitioner's case is granted.

22 14. At the January 16, 2007 status conference, the parties shall be prepared to argue  
23 the admissibility of the six photos of the victims and crime scenes that respondent seeks to admit.

24 DATED: January 5, 2007.

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26 osbandmtnlimine.or

  
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U.S. MAGISTRATE JUDGE